Supreme Court, U.S.
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No. 03-

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IN THE

Supreme Court of the United States

AURORA NATIONAL LIFE ASSURANCE COMPANY AND NEW CALIFORNIA LIFE HOLDINGS, INC.,

Petitioners,

v.

SIERRA NATIONAL INSURANCE HOLDINGS, INC. AND GEORGIA LEE, AS RECEIVER FOR SIERRA NATIONAL INSURANCE HOLDINGS, INC.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

CARTER G. PHILLIPS
RICHARD D. BERNSTEIN*
THEODORE N. MILLER
JACQUELINE G. COOPER
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

August 1, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

91 pp

QUESTION PRESENTED

Whether the Ninth Circuit exceeded its judicial power, in violation of fundamental principles of separation of powers and this Court's decision in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), and in conflict with two other circuit courts, by reaching the substantive issue raised in a proper collateral order appeal while expressly refusing to address the threshold issue of whether it and the district court had Article III jurisdiction over the case?

PARTIES TO THE PROCEEDING

In addition to the named parties to this proceeding, other defendants below include Credit Lyonnais S.A., Altus Finance S.A., CDR Enterprises, MAAF Assurances, MAAF Vie S.A., Omnium Geneve S.A., Consortium de Realisation S.A., Francois Pinault, Jean-Claude Seys, Jean-Francois Henin, Jean Irigoin, Artemis S.A., Artemis Finance S.N.C., and Artemis America.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Petitioners Aurora National Life Assurance Company ("Aurora") and New California Life Holdings, Inc. ("New California") state that New California is the holding company of Aurora. The stock of New California is owned by Aurora S.A. through a voting trust (67%) and SunAmerica Inc. (33%). Neither Aurora S.A. nor SunAmerica Inc. is publicly held. Aurora S.A. is a subsidiary of Artemis S.A., which is not publicly held. SunAmerica Inc. is a subsidiary of American International Group, Inc., which is publicly held.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Aurora National Life Assurance Company ("Aurora") and New California Life Holdings, Inc. ("New California") respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Ninth Circuit was issued on March 26, 2003, and is included in the Appendix at 1a-4a. The unpublished opinion of the United States District Court for the Central District of California was issued on December 18, 2001, and

is included in the Appendix at 5a-24a. An earlier decision of the district court issued on June 20, 2001, is included in the Appendix at 25a-57a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its judgment and opinion on March 26, 2003. Petitioners' timely petition for rehearing was denied on May 6, 2003. Pet. App. 58a-59a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2 of the United States Constitution provides:

> The judicial Power shall extend to . . . Cases . . . [and] Controversies . . .

STATEMENT OF THE CASE

This petition presents the question whether a court of appeals with appellate jurisdiction over a proper collateral order appeal must consider whether the federal courts have Article III jurisdiction over the case. The Court has held that it must, *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765, 771 (2000), as have the Second and Tenth Circuits. In conflict with these decisions, the Ninth Circuit held that it was "discretionary" whether to review the Article III issue of the plaintiff's standing and "decline[d]" to do so. Pet. App. 3a n.1. This fundamental question governing the proper steps for appellate decision making warrants this Court's review.

The plaintiff, Sierra National Insurance Holdings, Inc. ("Sierra"), was a disappointed bidder in the 1991-92 auction held by California Insurance Commissioner John Garamendi and the Superior Court for the County of Los Angeles

("Conservation Court") for the rehabilitation of the insolvent Executive Life Insurance Co. ("ELIC") and the sale of ELIC's junk bonds. Sierra alleges that certain defendants committed wrongs in acquiring assets from the ELIC estate during its insolvency proceedings. The Commissioner, who continues to serve as the Conservator for the ELIC estate, is suing for these same alleged wrongs. See *Low* v. *Altus Fin. S.A.*, No. 99-CV-02829 (C.D. Cal. filed Feb. 18, 1999) ("*Low*").

1. *ELIC Insolvency and Conservation Proceedings.* During the late 1980s and early 1990s, the junk bond market declined precipitously. Due to ELIC's ownership of one of the largest and most default-ridden portfolios of junk bonds of any financial institution in the world, it became massively insolvent. The value of ELIC's liabilities exceeded the value of its assets by several billion dollars. As a result, the Commissioner assumed control of ELIC in April 1991, and placed it into conservation proceedings before the Conservation Court. That court named the Commissioner conservator of the ELIC estate.

The Commissioner conducted an auction of ELIC's junk bond portfolio and the rehabilitation of its insurance business over a number of months. One of the eight bidders was Sierra, a recently formed insurance company shell that never issued a single policy or conducted any business. Sierra's lead investors were Warren Hellman and Sam Zell, two of this country's wealthiest individuals. From the eight resulting bids, the Commissioner selected the bid of Altus/MAAF, a consortium of foreign insurers and investment firms. The day after the Commissioner's announcement, Warren Hellman stated publicly that "the Altus bid was an even better bid" than Sierra's. C.A. App. 119.[1]

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[1] C.A. App. refers to the Excerpts of Record filed in the Ninth Circuit.

Under the winning bid, (a) Altus would purchase ELIC's junk bonds, while (b) the insurance liabilities would be rehabilitated and assumed by a new junk bond free insurance company called Aurora, a California corporation. Aurora's shares would be owned by New California, a domestic holding company. The MAAF Group, comprised of foreign, private companies, would own New California's shares. This bid also provided that Aurora would infuse $300 million in new capital into the insurance company, and also would provide over $300 million in enhancements to ELIC policyholders who became Aurora policyholders.

The Conservation Court approved the Commissioner's selection of the Altus/MAAF bid, observing that it was the "highest and best bid received." C.A. App. 396 n.24. The California Court of Appeal also affirmed the approval. *In re Executive Life Ins. Co.*, 32 Cal. App. 4th 344 (1995). A majority of ELIC policyholders also supported the Commissioner's selection of the Altus/MAAF bid, and with good reason: Through its acceptance, ELIC's policyholders received 92% or more of their policy values, whereas most experts had predicted policyholders would receive approximately 75%. C.A. App. 126, 385. Over 70%, by dollar amount, of ELIC's policyholders accepted restructured insurance contracts from Aurora. Aurora's policyholders continue to receive over $ 5 billion in insurance and annuity coverage from Aurora.

2. The Commissioner's Suit: Low v. Altus Finance. In February 1999, the Commissioner filed suit against, among others, Altus and the MAAF Group in California Superior Court alleging fraud, conversion and unfair competition with respect to the ELIC rehabilitation. See *Low*, No. 99-CV-02829 (C.D. Cal. filed Feb. 18, 1999).[2] Specifically, the Commissioner alleges that, through a series of agreements,

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[2] Aurora and New California were not named as defendants in *Low* until the Commissioner filed his fourth complaint in February 2000.

Altus – which was majority owned by Credit Lyonnais, an arm of the French government – was really in control of the MAAF shareholders in their activities concerning New California. Although the Commissioner was well aware that Credit Lyonnais was a major player in the rehabilitation, the Commissioner alleges that Credit Lyonnais had a secret role that violated both California and federal statutes. The Commissioner maintains that had he known of the alleged secret relationship and agreements between Altus and the MAAF Group, he would not have selected the Altus/MAAF bid. The Commissioner seeks damages and restitution on behalf of former ELIC policyholders. Credit Lyonnais, a named defendant in *Low*, and another foreign defendant removed the Commissioner's suit to federal district court pursuant to the removal provisions of the Foreign Sovereign Immunities Act ("FSIA"). All defendants concede the Commissioner's standing to pursue those claims.

3. *The Proceedings Below*. Sierra dissolved in April 1992, a few months after it lost the auction in late 1991.[3] Nevertheless, nearly nine years later, Sierra's court-appointed receiver sued Aurora and others for interference with business expectancy, RICO, and abuse of process, seeking $3.5 billion in damages, an amount greater than ten times Aurora's net worth.[4] Sierra's suit is based on the same allegations that form the basis of the Commissioner's suit: that Altus/MAAF concealed the fact that a foreign bank and government would

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[3] Sierra's "Certificate of Dissolution Before Beginning Business," dated April 20, 1992, states: "1. The business for which the corporation was organized has not begun; 2. No part of the capital of the corporation has been paid; and 3. No shares of stock have been issued." C.A. App. 418.

[4] Sierra filed suit in California Superior Court. The action was timely removed to federal district court by Aurora under 28 U.S.C. § 1441(b) based on Sierra's federal RICO claims. This action was also timely removed by Credit Lyonnais, on behalf of itself and certain other foreign defendants, under the additional provision of 28 U.S.C. § 1441(d) based on the FSIA.

control Aurora's ultimate owners in alleged violation of federal and state law. Indeed, these allegations previously were raised unsuccessfully by Sierra and others during the 1991-93 conservation proceedings. C.A. App. 245, 325-27, 670. Despite these allegations, the Insurance Commissioner selected the Altus/MAAF bid, the Conservation Court approved the sale after a 13-day trial, and Aurora was granted an insurance license.

Aurora moved to dismiss Sierra's Complaint on many grounds, including that Sierra lacked standing under Article III and California law to bring this suit, and that Aurora is immune from suit under California's broad immunity for judicial and other proceedings, Cal. Civ. Code § 47(b). Aurora argued that Sierra does not have standing to bring this suit because under California law, no legally protected interest can be predicated on an asserted injury as a disappointed bidder in a conservation proceeding. Aurora relied on *In re Pacific Standard Life Ins. Co.*, 12 Cal. Rptr. 2d 50, 53 (Cal. Ct. App. 1992), in which the state appellate court specifically held that a disappointed bidder to a conservation sale requiring court approval lacks a "legally cognizable interest," and therefore standing, even when it alleges it should and would have been the winning bidder in a proper bidding contest.

The district court dismissed all of Sierra's claims except the claim for intentional tortious interference. As to that claim, the district court concluded that (a) Sierra had standing because it alleged it would have been the winning bidder, and (b) Aurora was not immune from suit because the proceedings in the Conservation Court did not fall within the scope of § 47(b). The district court equated the issue of standing to bring a tortious interference claim and causation. Specifically, the district court "construe[d] the [standing] issue to be whether a disappointed bidder (Sierra) may maintain suit for lost profits against the successful bidder when the Commissioner had indicated a commitment to pick

one of the two – although the Rehabilitation Court was not bound to approve either bid." Pet. App. 42a. The district court dismissed the RICO claim, without leave to amend, for lack of standing. *Id.* at 18a-22a.

Aurora appealed to the Ninth Circuit. The panel held that the court had jurisdiction to hear the appeal under the collateral order doctrine because the district court denied a claim to immunity from suit. Pet. App. 3a ("A denial of a motion to dismiss would normally not be a final reviewable order, but a ruling denying a claim of immunity from suit . . . is immediately appealable under the collateral order doctrine.") The panel then affirmed the district court's order with respect to denying Aurora's claim to immunity under § 47(b). *Id.* at 4a.

The panel, however, declined to review the district court's order with respect to Sierra's standing. The panel acknowledged that this Court "happened" to address standing on a collateral order appeal in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), but concluded that "nothing in that opinion indicates that an appellate court *must* do so." Pet. App. 3a n.1 (emphasis in original). Thus, the panel held that in a collateral order appeal, it was "discretionary" whether the court of appeal must first resolve the question of Article III jurisdiction, and it therefore "decline[d] to address the question of Sierra's standing." *Id.* The panel further noted that "standing is potentially quite fact-dependant [sic] in this case and can be adequately addressed after a final decision is entered." *Id.*

REASONS FOR GRANTING THE PETITION

The decision below contravenes this Court's decision in *Vermont Agency*, 529 U.S. at 771. It also expressly and squarely conflicts with two other circuits' holdings on the question whether federal courts of appeals are obliged to

consider, at the threshold of a proper collateral order appeal, whether the federal courts have Article III jurisdiction over the case. Indeed, the conflict is deeper because circuit courts addressing other kinds of interlocutory appeals – including 28 U.S.C. § 1292(a) appeals of injunction orders and § 1292(b) certifications – also have held that Article III jurisdiction issues must be addressed as a threshold matter. By deciding a substantive issue without first addressing a challenge to the federal courts' Article III power to hear the case, the Ninth Circuit exceeded the federal courts' limited power to hear cases and controversies, rather than decide hypothetical issues.

I. THE DECISION BELOW EXPRESSLY AND SQUARELY CONFLICTS WITH A DECISION OF THIS COURT.

Review by this Court is warranted because the Ninth Circuit's refusal to address Article III jurisdiction conflicts with this Court's decision in *Vermont Agency*, 529 U.S. 765. In misinterpreting and misapplying *Vermont Agency*, the court of appeals necessarily disregarded the fundamental constitutional principle that a federal appeals court is required to establish that Article III jurisdiction exists in every case under review before examining any particular substantive issue.

It is firmly established in this Court's cases that "[o]n *every* writ of error or appeal" a federal appeals court must first establish the federal courts' Article III jurisdiction "as a threshold matter" before reaching any substantive issue. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (emphasis added and internal quotation marks omitted). As the Court explained, this obligation flows directly from the limited jurisdiction granted to federal courts by Article III of the United States Constitution: "The *requirement* that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is '*inflexible and without exception*.'" *Id.* at 94-95

(emphasis added) (quoting *Mansfield, C. & L.M. Ry.* v. *Swan*, 111 U.S. 379, 382 (1884)). Indeed, when federal appeals courts fail to satisfy themselves that Article III jurisdiction exists over a case, they carry themselves "beyond the bounds of authorized judicial action" and "thus offend[] fundamental principles of separation of powers." *Id.* at 94. See also *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) ("Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution . . . For that reason, *every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review*, even though the parties are prepared to concede it.") (internal quotation marks omitted) (emphasis added).[5]

Consistent with its command that Article III jurisdiction must be examined on "every writ of error or appeal," *Steel Co.*, 523 U.S. at 94, this Court applied that requirement to a collateral order appeal in *Vermont Agency*, 529 U.S. at 771. *Vermont Agency* is squarely on point here. The ruling under review in *Vermont Agency*, like the ruling at issue here, was the denial of a motion to dismiss based on a claim to immunity from suit. *Id.* at 770. As in this case, the immunity ruling was immediately appealable under the collateral order doctrine. *Id.* at 770 n.2.[6] Nonetheless, citing its decision in *Steel Co.*, 523 U.S. at 93-102, this Court "first address[ed] the jurisdictional question whether respondent . . . ha[d] *standing*

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[5] In *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 583 (1999), this Court reiterated that Article III "requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of a case."

[6] Under the collateral order doctrine, a decision that does not end litigation on the merits is nevertheless "appealable as a 'final decision' under § 1291" where it "conclusively determine[s] the disputed question, resolve[s] an important issue completely separate from the merits of the action, and [is] effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978).

under Article III of the Constitution to maintain this suit." *Vermont Agency*, 529 U.S. at 771 (emphasis added). Thus, even though only the immunity *issue* satisfied the requirements for a collateral order appeal in *Vermont Agency*, the Court concluded that, once appellate jurisdiction attached, the principles set forth in *Steel Co.* and its predecessors required the Court to determine whether the *case* as a whole satisfied the "case or controversy" requirement of Article III before the Court examined the immunity issue.[7]

The panel below acknowledged *Vermont Agency*, but characterized the opinion as one in which this Court "happened to address the question of standing on interlocutory appeal" and asserted that "nothing in that opinion indicates that an appellate court *must* do so." Pet. App. 3a n.1 (emphasis in original); see also *id.* (ruling that the interlocutory nature of a collateral order appeal made it "discretionary" whether a court of appeals must first resolve the question of Article III jurisdiction).

The Ninth Circuit's characterization that *Vermont Agency* "happened to address the question of standing" without careful consideration of whether it had a duty to do so is plain error. First, in *Vermont Agency*, the Court *sua sponte* ordered the parties "to file supplemental briefs" on the standing issue after their regular briefing, which was complete, had not addressed standing. 528 U.S. 1015 (1999).

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[7] *Vermont Agency* does not open the floodgates to numerous appeals from denials of motions to dismiss on standing grounds. *Vermont Agency* leaves intact the general rule that "denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable." *Catlin* v. *United States*, 324 U.S. 229, 236 (1945). Only when a court of appeals rules (as the Ninth Circuit did) that it properly has appellate jurisdiction by virtue of some other issue that is immediately appealable, must the court also address whether the federal courts have Article III jurisdiction over the underlying case.

Second, in the *Vermont Agency* opinion, in support of its threshold examination of standing, this Court cited its decision in *Steel Co.*, 523 U.S. at 93-102, which held that a federal appellate court has a duty to examine its Article III jurisdiction "*without exception*" on "*every* writ of error or appeal," and that this duty is based on the core separation of powers principles that underlie Article III. *Steel Co.*, 523 U.S. at 94-95 (emphasis added). Indeed, on the cited pages from *Steel Co.*, the Court went to great lengths to reject the position of the Ninth Circuit in that case that Article III jurisdiction need not be resolved first in every case. *Id.* By relying on *Steel Co.*, this Court in *Vermont Agency* left no doubt that a federal appellate court's mandatory obligation to examine Article III jurisdiction applies to a proper collateral order appeal. The Ninth Circuit's contrary ruling below plainly contravenes this Court's holding. This conflict warrants certiorari, or even summary reversal.

II. THE DECISION BELOW EXPRESSLY AND SQUARELY CONFLICTS WITH DECISIONS OF BOTH THE SECOND AND TENTH CIRCUITS.

The decision below also widens an inter-circuit split on the core jurisdictional issue. Both the Second and Tenth Circuits have recognized the obligation of federal courts of appeals to examine Article III jurisdiction as a threshold matter in proper collateral order appeals. *Merritt* v. *Shuttle, Inc.*, 187 F.3d 263, 269 (2d Cir. 1999); *Timpanogos Tribe* v. *Conway*, 286 F.3d 1195, 1201 (10th Cir. 2002). In contrast, the Eleventh Circuit (like the Ninth Circuit here) has held otherwise. *Moniz* v. *City of Fort Lauderdale*, 145 F.3d 1278, 1281 n.3 (11th Cir. 1998); *Summit Med. Assocs., P.C.* v. *Pryor*, 180 F.3d 1326, 1334-36 (11th Cir. 1999).

The circuit conflict is direct and expanding. In *Merritt*, the Second Circuit, like the panel in this case, addressed an interlocutory appeal under the collateral order doctrine of an order denying a motion to dismiss based on a claim to immunity from suit. 187 F.3d at 267. The court held that, in

addition to resolving the immunity question, it "*must* examine whether the district court had subject matter jurisdiction over the claim now on appeal" because "[t]he existence of subject matter jurisdiction goes to the very power of the district court to issue the rulings now under consideration." *Id.* at 268-69 (emphasis added) (citing *Steel Co.*, 523 U.S. at 101-02). The Second Circuit noted that "review of the district court's order on the [immunity] claim would be meaningless if the district court was without jurisdiction over that claim in the first instance." *Merritt*, 187 F.3d at 269.

Similarly, in *Timpanogos Tribe*, the Tenth Circuit also had before it an interlocutory appeal under the collateral order doctrine of an order denying a motion to dismiss based on a claim to immunity from suit. 286 F.3d at 1198-99. The court held that it first "must address defendants' argument that the district court lacked subject matter jurisdiction over the Tribe's claim," consistent with the "longstanding rule that jurisdiction is a threshold question which an appellate court must resolve before addressing the merits of the matter before it." *Id.* at 1201 (citing *Steel Co.*, 523 U.S. at 94, 95). The Tenth Circuit further noted that its holding was consistent with the Second Circuit's holding in *Merritt*.[8]

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[8] The conclusions of the Second and Tenth Circuits have also found support in the Sixth Circuit. *See Children's Healthcare is a Legal Duty, Inc.* v. *Deters*, 92 F.3d 1412, 1419 (6th Cir. 1996) (opinion of Batchelder, J.). In *Children's Healthcare*, the Sixth Circuit addressed a collateral order appeal of an order denying a motion to dismiss based on a claim to immunity from suit. *Id.* at 1413-14. Even though the appellant did not challenge the district court's ruling that the plaintiffs had standing, Judge Batchelder would have reached the standing issue *sua sponte*. She stated that "when an appellant properly appeals another issue, the issue of standing comes before us as well. Constitutional standing is *always* a threshold inquiry for us to make before asserting jurisdiction over an appeal." *Id.* at 1419 (emphasis in original); *see also id.* at 1419 n.2 ("federal courts, being courts of limited jurisdiction, must examine their subject-matter jurisdiction throughout the pendency of *every* matter before them") (emphasis in original; internal quotation marks omitted).

As the Second and Tenth Circuits recognized, the obligation to examine Article III jurisdiction on interlocutory appeals is fully consistent with the Supreme Court's decision in *Swint* v. *Chambers County Comm'n*, 514 U.S. 35 (1995). *Swint* indicated that the limited scope of pendent appellate jurisdiction includes those issues "necessary to ensure meaningful review" of an interlocutory appeal. *Id.* at 51. As the Second Circuit explained:

> [O]ur examination of the basis for the district court's subject matter jurisdiction over the *Bivens* claim is "necessary to ensure meaningful review of" the district court's order denying qualified immunity on that claim. The existence of subject matter jurisdiction goes to the very power of the district court to issue the rulings now under consideration.

Merritt, 187 F.3d at 269. See also *Timpanogos Tribe*, 286 F.3d at 1201 ("As in *Merritt*, our examination of the basis for the district court's subject matter jurisdiction over the Tribe's claim is necessary to ensure meaningful review of the district court's order denying Eleventh Amendment immunity on that claim.").

In direct conflict with *Merritt* and *Timpanogos Tribe*, the Eleventh Circuit, like the Ninth Circuit here, has refused to address Article III jurisdiction as a threshold matter on collateral order appeals. In *Moniz*, the Eleventh Circuit had before it a collateral order appeal of an order denying a motion for summary judgment based on a claim to immunity from suit. 145 F.3d at 1280. The appellants also asserted that the plaintiff "lack[ed] standing under Article III of the Constitution" to maintain the suit. *Id.* at 1281 n.3. The Eleventh Circuit reached the merits of the immunity issue without addressing this threshold jurisdictional issue, stating in a footnote that the standing issue "does not fall within our pendent appellate jurisdiction under *Swint*." *Id.* Similarly, in *Summit Medical Associates*, the Eleventh Circuit relied on *Moniz* in refusing to address an Article III standing issue in a

collateral order appeal of an order denying a motion to dismiss based on a claim to immunity from suit. 180 F.3d at 1329, 1334-36 & n.8.

In sum, the Ninth Circuit decision below widens the inter-circuit split on an important legal issue of federal court power. The question whether federal courts of appeal must address Article III jurisdiction in proper collateral order appeals is a recurring one, as demonstrated by the recent vintage of the court of appeals' decisions that conflict with the decision below. Given the continuing refusal of some courts of appeals to address Article III jurisdiction in such appeals, this case presents an important and recurring issue concerning the fundamental premises of appellate decision making. That issue warrants review by this Court.

III. THE RULING BELOW REFLECTS A FUNDAMENTAL MISUNDERSTANDING OF THE FEDERAL COURTS' LIMITED POWER TO HEAR CASES AND CONTROVERSIES.

The jurisdictional issue presented in this case goes to the very heart of the federal appeals courts' judicial power. As this Court recognized in *Steel Co.*, 523 U.S. at 101, "[m]uch more than legal niceties are at stake" when questions about jurisdiction arise. For a federal court to reach an issue "when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Id.* at 101-02.

By addressing an important immunity issue (and, indeed, making new law) without even considering whether it and the district court had power to hear the case, the panel below fundamentally misunderstood that the limited role of all federal courts is to hear cases and controversies. This Court consistently has held that Article III means that *no* federal court may render an advisory opinion on an *issue* where no underlying *case* or *controversy* exists. See, *e.g.*, *United States Nat'l Bank of Or.* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993) ("'The exercise of judicial power under

Art. III of the Constitution depends on the existence of a case or controversy,' and 'a federal court [lacks] the power to render advisory opinions'") (alteration in original) (quoting *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975)). "[T]he Article III prohibition against advisory opinions . . . confine[s] federal courts to a role consistent with a system of separated powers." *Flast* v. *Cohen*, 392 U.S. 83, 97 (1968).

The panel below overlooked these fundamental principles by reaching the immunity *issue* without satisfying itself that the *case* was properly within the jurisdiction of the federal courts in the first place. While the collateral order doctrine authorizes the federal appeals courts to resolve certain *issues* prior to a final judgment on the entire case, no doctrine governing federal appellate jurisdiction could override the Article III requirement that a *case* or *controversy* exist before *any* federal court may address *any* substantive issue.

This Court's practice after a grant of certiorari illustrates these principles. This Court's grant of certiorari is ordinarily limited to a particular issue or issues. Nonetheless, as *Vermont Agency* illustrates, it is black-letter law that if an Article III jurisdiction question (including standing) is present, this Court *must* address the jurisdictional question as a threshold matter even though the Court did not grant certiorari on the Article III issue. See, *e.g.*, Robert L. Stern et al., *Supreme Court Practice* 812 (8th ed. 2002) ("[Standing] requirements *must* be satisfied at every stage of a federal court proceeding, from the initiation of the suit to its final review in the Supreme Court. *When a standing problem is present, the Court will give serious attention to the matter even if not raised by the parties or passed upon by the courts below.*") (emphasis added); *Arizonans For Official English* v. *Arizona*, 520 U.S. 43, 73 (1997) (addressing mootness issue because this Court has "an obligation essentially to search the pleadings on core matters of federal-court adjudicatory authority – to inquire not only into this Court's authority to decide the questions petitioners present, but to consider, also,

the authority of the lower courts to proceed"); *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 230-31 (1990) (plurality) (addressing standing issue that was neither addressed by the lower federal courts nor raised by either party because "federal courts are under an independent *obligation* to examine their own jurisdiction") (emphasis added); *Bender*, 475 U.S. at 540-41 (1986) (addressing standing question that this Court noticed for the first time after certiorari was granted).

This Court's certiorari practice cannot be squared with the panel's ruling that an appeals court has greater discretion than the Supreme Court to ignore Article III issues. Significantly, the Ninth Circuit's misguided view has the potential substantially to expand the federal appeals courts' ability to issue advisory opinions because it necessarily extends beyond the context of collateral order appeals to other forms of immediate appeal, such as review authorized by 28 U.S.C. § 1292(a) or (b). If, as the Ninth Circuit panel held, federal appellate courts can reach the merits of substantive issues raised in a collateral order appeal, without addressing whether an Article III "case or controversy" exists, then federal appellate courts presumably can ignore the "case or controversy" requirement when they have appellate jurisdiction because of particular issues arising in other interlocutory contexts.

But this Court and the federal appeals courts have properly recognized that in interlocutory appeals under 28 U.S.C. § 1292, Article III jurisdiction issues must be addressed as a threshold matter. Thus, in appeals under section 1292(a) of orders granting or denying injunctive relief, the courts of appeals address first any issue of Article III jurisdiction. See, e.g., *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 287-88 (1940) (federal appeals court addressing interlocutory appeal of preliminary injunction under the predecessor to 28 U.S.C. § 1292(a) properly examined the denial of a motion to

dismiss arguing that the district court lacked jurisdiction).[9] *Accord*, 16 Charles Alan Wright et al., *Federal Practice and Procedure* § 3921.1, at 34 & n.14 (2d ed. 1996) (in an interlocutory injunction appeal, "[s]ubject matter jurisdiction always is open"); *Acierno* v. *Mitchell*, 6 F.3d 970, 974 (3d Cir. 1993) (addressing ripeness challenge on appeal of grant of preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1) because "we . . . must determine whether the issues are ripe for decision in the 'Case or Controversy' sense") (omission in original) (internal quotation marks omitted).[10]

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[9] In *Deckert*, the interlocutory order granting the preliminary injunction was immediately appealable under 28 U.S.C. § 129. 311 U.S. at 286-87. Today, such interlocutory orders are immediately appealable under 28 U.S.C. § 1292(a)(1).

[10] Indeed, in *Meredith* v. *Oregon*, 321 F.3d 807 (9th Cir. 2003), a different panel of the Ninth Circuit held in an interlocutory appeal of a preliminary injunction granted by the district court that in addition to resolving the merits of the preliminary injunction, it also would resolve whether the district court should have abstained under *Younger* v. *Harris*, 401 U.S. 37 (1971), in favor of pending state court proceedings. That panel noted that its approach applied to resolution of other issues as well on interlocutory appeals, including "[r]esolution of subject matter jurisdiction . . . because if appellate courts lack jurisdiction, they cannot review the merits of these properly appealed rulings." *Id.*

The *Meredith* opinion was issued shortly after the oral argument in this case and petitioners promptly brought it to the attention of the panel in this case in a letter pursuant to Fed. R. App. P. 28(j). The panel in this case nevertheless issued its opinion holding that it is "discretionary" whether the court of appeals must first resolve the question of Article III jurisdiction in an interlocutory appeal. Pet. App. 3a n.1. Petitioners again brought *Meredith* to the attention of the panel in their petition for rehearing and suggestion for rehearing en banc, but the panel adhered to its holding that it was not required to address Article III jurisdiction (and "no Judge [on the full court] requested a vote on whether to rehear the matter en banc," Pet. App. 59a). The decision below thus can only mean that the Ninth Circuit treats consideration of Article III jurisdiction on interlocutory appeals as a matter of case-by-case discretion – in clear contravention of *Vermont Agency*.

Standard practice under 28 U.S.C. § 1292(b) also requires that any issue of Article III jurisdiction be resolved first. Section 1292(b) permits circuit courts to exercise appellate jurisdiction when a district court properly certifies for interlocutory appeal orders that "involve[] a controlling question of law as to which there is substantial ground for difference of opinion," where the district court concludes that "immediate appeal from the order may materially advance the ultimate termination of the litigation." The federal appeals courts have properly concluded that in such appeals they must address Article III jurisdiction issues as a threshold matter, even when those Article III issues were *not* certified by the district court. See, *e.g.*, *Larsen* v. *Senate of Pa.*, 152 F.3d 240, 245-46 (3d Cir. 1998) ("[W]e have an *obligation* to determine whether the instant controversy is justiciable prior to our reaching the merits of the issues certified for appeal" under section 1292(b).) (citing *Steel Co.*, 523 U.S. at 93-95) (emphasis added); *Ivy Club* v. *Edwards*, 943 F.2d 270, 275-76 (3d Cir. 1991) ("We *must* necessarily decide the issue of mootness [in section 1292(b) appeal in which district court did not certify that question] because this court has a special obligation to satisfy itself of its own jurisdiction in every appeal presented to it.") (internal quotation marks omitted) (emphasis added); *Kemp* v. *International Bus. Machs. Corp.*, 109 F.3d 708, 711 (11th Cir. 1997) (addressing challenge to district court's jurisdiction over the case prior to reaching the issue certified by the district court under section 1292(b)).

The decision below is in clear tension with these decisions addressing interlocutory appeals under sections 1292(a) and (b). The panel's conclusion that it had no obligation to address Article III jurisdiction in an interlocutory collateral order appeal cannot be reconciled with the holdings of these other courts that such an obligation exists in all proper interlocutory appeals (indeed, all proper appeals) by virtue of Article III's "case or controversy" requirement. Thus, the panel's decision has implications beyond collateral order

appeals and suggests that the Ninth Circuit would likewise consider itself to have discretion to ignore challenges to Article III jurisdiction in other types of interlocutory appeals. The decision thus creates the potential for unchecked issuance of advisory opinions by the Ninth Circuit and other circuits and, as a result, serious encroachment on the separation of powers principles that underlie Article III. For this reason as well, the decision below warrants review by this Court, or even summary reversal.

IV. THE DECISION BELOW PROVIDES AN APPROPRIATE VEHICLE FOR ADDRESSING THE QUESTION PRESENTED.

The circuit conflict presented by this petition is clear, and the panel's decision squarely implicates that conflict. Because of this, petitioners anticipate that respondents' opposition may attempt to divert attention from that important conflict by arguing that the decision below is not an appropriate vehicle for this Court to resolve that conflict. Petitioners address some of these potential arguments below in order to demonstrate that they are red herrings.

A. There Are No Questions Of Fact That Render This Case An Inappropriate Vehicle For Review By This Court Of The Question Presented.

The Ninth Circuit's assertion below that "standing is *potentially* quite fact-dependant in this case" does not render this case an inappropriate vehicle for addressing the core legal issue of whether a court of appeal must address Article III standing in a proper collateral order appeal. See Pet App. 3a n.1 (emphasis added). This is because even when standing is potentially factual, Article III requires a federal court to determine whether the plaintiff has at least *alleged* facts that support standing under the correct legal rule of standing. See *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 65 (1987) (Article III jurisdiction of a court can only be invoked when a plaintiff makes "allegations" that, if

true, would create standing); *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975) ("Art. III's requirement" is that "the plaintiff . . . must *allege* a distinct and palpable injury to himself") (emphasis added). The Ninth Circuit never stated any legal rule of standing and expressly "decline[d]" to assess whether Sierra had alleged facts sufficient to satisfy the correct rule. Pet. App. 3a n.1.

In this case, petitioners' position has been that Sierra cannot make the necessary allegations under the correct legal rule of standing. To allege Article III standing, Sierra cannot merely allege causation of *some* injury, but instead must allege "the violation of a *legally protected* right." *Vermont Agency*, 529 U.S. at 772-73 (emphasis added). As Sierra's only remaining claim is one under California law for tortious interference, state law must create the "legally protected right." Sierra therefore must satisfy the standing requirements of both Article III and California law. See 13A Charles Alan Wright et al., *Federal Practice and Procedure* § 3531.14, at 90-91 (2d ed. 1984); *Metropolitan Express Servs., Inc.* v. *City of Kansas City, Mo.*, 23 F.3d 1367, 1369 (8th Cir. 1994).

Sierra has asserted that its injury arose from its being the losing bidder in the insurance conservation proceeding. See, *e.g.*, C.A. App. 486 (Sierra brief stating "it was the selection of defendants as the winning bidder in December 1991 . . . which caused Sierra's injury"). But, under *In re Pacific Standard Life Ins. Co.*, 12 Cal. Rptr. 2d at 53, the court held that a disappointed bidder in an insurance conservation lacks a "legally cognizable interest" in the outcome of those proceedings, and has no standing. In *Pacific Standard*, the disappointed bidder, like Sierra here, alleged that its bid would have been selected absent tortious wrongdoing – indeed, that disappointed bidder had a *signed contract* with the conservator, *id.* at 52. The court ruled, nonetheless, that disappointed bidders have "no legally cognizable interest" because of Cal. Ins. Code § 1037. As the court explained, "*[o]nly* by express judicial authorization and prescription of

sales terms may a *legally cognizable interest* be created in any potential buyer in this statutory context." *Id.* at 53 (emphasis added). The "requirement of judicial authorization and prescription of terms fatally attenuated whatever interest, *whether present or prospective*, [the disappointed bidder] claimed to have in the purchase of [the failed company]." *Id.* at 54 (emphasis added). Under *Pacific Standard*, Sierra's "interest *ended* with the court's authorization to sell [the insurance company] to another suitor." *Id.* at 55 (emphasis added).

Sierra has conceded that *Pacific Standard* deprives disappointed bidders (like Sierra) of standing to appeal. *See* Opening Brief of Appellees and Cross-Appellants, *Sierra Nat'l Ins. Holdings, Inc.* v. *Credit Lyonnais S.A.*, Nos. 02-55193, 02-55259 (9th Cir. filed July 15, 2002), at 59. Sierra's sole argument has been that *Pacific Standard* is limited to standing to appeal. See, e.g., *id.* at 58-59. Thus, the standing issue in this case is a purely legal one: whether *Pacific Standard* applies to standing to bring new lawsuits, or is limited to standing to appeal.

The only question presented to this Court is whether a court of appeals must address Article III jurisdiction in a proper collateral order appeal. It is irrelevant to the question presented which side's interpretation of *Pacific Standard* and Cal. Ins. Code § 1037 is correct. Whichever side is correct, standing in this case turns on questions of interpreting the law. The Ninth Circuit's express refusal to address the legal issue of standing, in what it held was a proper collateral order appeal, conflicts with *Vermont Agency* and the decisions of other circuit courts.[11]

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[11] For two independent reasons, Sierra could not avoid this conflict by arguing that it has alleged an injury to a "legally protected right" based on Aurora's allegedly improper receipt of an insurance license. First, as the district court ruled, "Sierra alleges that 'the selection of defendants as the winning bidder in December 1991 . . . caused Sierra's injury,'" and thus,

B. This Court Can Only Review The Question Presented By This Petition While The Case Is In Its Current Posture.

The Ninth Circuit's statement that the standing issue presented in this case, unlike the immunity issue, "can be adequately addressed after a final decision is entered," Pet. App. 3a n.1, does not undermine the appropriateness of review by this Court of the question presented by this petition in its current posture. Petitioners' question presented seeks review of whether Article III required the Ninth Circuit panel to address standing *now* as part of the collateral order appeal. The only time this Court could review the Ninth Circuit's holding that it had discretion to refuse to address Article III jurisdiction on a proper collateral order appeal is by reviewing the ruling on that collateral order appeal itself.

C. The Panel's Unpublished Decision Is An Appropriate Vehicle For Supreme Court Review.

This Court routinely grants certiorari with respect to unpublished decisions, particularly when those decisions squarely implicate circuit conflicts. See, *e.g.*, *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 430-31 (2001) (unpublished Ninth Circuit decision implicating circuit conflict); *Major League Baseball Players Ass'n* v. *Garvey*,

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as the district court further ruled, nothing after that date can provide a basis for a claim by Sierra. Pet. App. 23a. Aurora did not receive its insurance license until December 1992. C.A. App. 354-56. Second, the legal rule in California is that no one has standing to raise a claim for interference with business expectancy based on a government licensing proceeding. See, *e.g.*, *Della Penna* v. *Toyota Motor Sales, U.S.A., Inc.*, 902 P.2d 740, 749 (Cal. 1995) (noting that interference with business expectancy "d[oes] not encompass injury resulting from government licensing proceedings"); *Sessions Tank Liners, Inc.* v. *Joor Mfg., Inc.*, 17 F.3d 295, 302 (9th Cir. 1994) ("[T]he California Supreme Court has limited the types of prospective advantage that it will protect: a person's expectancy in the outcome of a government licensing proceeding is not protected against outside interference.") (internal quotation marks omitted).

532 U.S. 504, 508 (2001) (summarily reversing an unpublished Ninth Circuit decision); *Buckhannon Bd. & Care Home, Inc.* v. *West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 602 (2001) (unpublished Fourth Circuit decision implicating circuit conflict); *Carter* v. *United States*, 530 U.S. 255, 260 (2000) (unpublished Third Circuit decision implicating circuit conflict). This practice is appropriate because otherwise, circuit courts could evade this Court's review of decisions creating or widening conflicts simply by not publishing the decisions. The decision below widens a square conflict among the circuit courts and warrants this Court's review.

CONCLUSION

The petition for certiorari should be granted, or this Court should summarily reverse the Ninth Circuit's decision.

Respectfully submitted,

CARTER G. PHILLIPS
RICHARD D. BERNSTEIN*
THEODORE N. MILLER
JACQUELINE G. COOPER
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

August 1, 2003